IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 55 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

JAYANT MULCHAND SHAH

Versus

ELSEN UND METALL AKTIENGESELLS

Appearance:

MR ASPI KAPADIA for MR SB VAKIL for Petitioners

Respondents Nos. 1,2,3 and 5 are served.

Ms. Lata Parasnani for Mr. H.J.Tolani for Respondent No. 5.

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 23/06/98

ORAL JUDGEMENT

The appellants herein are the plaintiffs in the Special Civil Suit No. 64 of 1982. The respondents herein are respectively defendants nos. 1,2,3,4 and 5 in the said suit. They are referred to as the plaintiffs and the defendants in this judgment. The plaintiffs have filed the aforesaid suit in the Court of the learned Civil Judge, (S.D.), Kachchh at Bhuj for recovering the amount of freight they paid for transportation of 4000 M.T. salt and for recovering damages representing

mainlythe value of the salt.

2. The defendant No. 2 gave an application Exh. 58 (also appearing as Exh. 53-D in the typed copy of the order in question) for obtaining stay of the proceedings of the suit by virtue of section 34 of the Arbitration Act, 1940 ("the Act" for short). The defendant No. 2 contended that it carried on the business as Sea Carrier and the Ship Owner. However, as per the case of the plaintiffs, the defendant No. 2 entered into an agreement with the first defendant to purchase the Vessel 'M.V.Oba' and defendant No. 2 was at all the relevant point time in control and management of the said vessel. According to the case of defendant No. 2, defendants nos. 1,3 and 5 were unnecessarily joined as parties to the suit with an ulterior motive with a view to prolonging the matter in dispute between the parties and with a view to get out of the ambit of the arbitration clause in the agreement between the plaintiffs and defendant No. 2 through its agent defendant No. 3. It is the case of defendant NO. 2 that the vessel 'M.V.Oba' was placed at Kandla Port in sea worthy condition with all certificates valid for the purpose of loading the cargo and according to the plaintiffs' allegation, the cargo of salt was loaded. It is further the case of defendant No. 2 that after completing loading, it was the responsibility of the plaintiffs to pay the balance amount of freight and other dues in accordance with the respective clauses of the contract between the parties represented by fixure note. According to the defendant No. 2, the contract between the plaintiffs and defendant No. 2 was contained in the fixure note dated 5th December, 1981 and it contained clause 13 which reads as under :

> "Any dispute arising under this fixure note is to be settled as per and in accordance with the Indian Arbitration Act in Bombay."

3. According to the defendant No. 2, the entire suit was based on the fixure note dated 5th December, 1981 and that the defendant No. 2 was ever ready and willing to abide by the arbitration clause and to take all the necessary steps for the proper conduct of the arbitration under the said clause. Defendant No. 2 accordingly did not want to submit to the jurisdiction of the Court in the aforesaid suit and prayed for its stay under section 34 of the Act.

4. The plaintiffs resisted the application as per their reply Exh. 73. While denying the allegations made

in the application, they contended that the vessel 'M.V.Aba' was not in sea worthy condition and, therefore, it did not undertake the journey for its destination to Mombasa where the goods in question were to be delivered. Since the vessel in question was not in sea worthy condition, it was noticed by the plaintiffs that the material facts with regard to such condition of the vessel in question were suppressed from the plaintiffs. It was on account of such condition of the vessel in question that the plaintiffs were required to file the suit against the defendants including defendant No. 1 who was the owner of the vessel, although not a party to the contract in question between the plaintiffs and defendant No. 2 through defendant No. 3. It was also contended by the plaintiff that the application could not be granted as the other defendants had taken steps for participating in the proceedings of the suit. The plaintiffs finally contended that the discretion vested in the Court under section 34 could not be exercised for grant of stay as the application was not bonafide moved and as there would be multiplicity of proceedings inasmuch as there would be arbitration proceedings as between the plaintiffs and defendant No. 2 through defendant NO. 3 on one hand and the suit proceedings as between the plaintiffs and defendant No. 1 and/or defendant No. 1 and other defendants on the other hand. It was finally contended on behalf of the plaintiffs that the application moved by the defendant No. 2 was not bonafide and was given only with a view to prolonging the proceedings of the suit.

5. The learned trial Judge, by his impugned order dated 19th October, 1983, stayed the proceedings of the suit exercising his discretion under section 34 of the Act and the said order is subjected to challenge in this appeal from order by the plaintiffs.

6. It has been submitted on behalf of the plaintiffs-appellants that the substance of the suit was for obtaining back the amount of freight paid by the plaintiffs and for obtaining the damages including the value of the goods loaded for consignment to Mombasa. Since it was noticed by the plaintiffs that the vessel in question was not in sea worthy condition and id did not go beyond the limits of anchorage from the Kandla Port, there has been specific ground in the appeal from order reading as "there are allegations of fraud and misrepresentation and the suit ought not to have been stayed". Since the plaintiffs had an occasion to suffer the loss of freight as particularized in the suit as well as on account of the loss of goods due to unseaworthiness

of the vessel in question, the plaintiffs were required to join the other parties, defendant No. 1 in particular. The submissions which have been noted above have been reiterated by the learned advocate appearing on behalf of the appellants-plaintiffs in this appeal.

7. Ms. Lata Parasnani, learned advocate appearing for respondent No. 5 has supported the impugned order but mainly contended that the defendant No. 5 for whom she appear was not at all concerned with any of the claims in the suit inasmuch as the defendant no. 5 acted only as the Custom and Ship Clearance Agents and they were not concerned in any manner with regard to the transhipment of the goods in question as reflected by the contract between the plaintiffs and defendant No. 2 through defendant No. 3. According to her, defendant No. 5 had an occasion to move an application Exh. 46 in the trial Court for deleting defendant No. 5 as having unnecessarily been joined in the suit. Said application is pending for determination. She, however, contends that simply because some of the defendants had participated in the proceedings of interim injunction application and/or in the proceedings of getting themselves deleted from suit, it cannot be said that they participated in the proceedings of the suit. From that stand point, she made a reference to the decision of the Hon'ble Supreme Court in the case of Food Corporation of India and others v. Yadav Engineer and Contractor, reported in AIR 1982 SC 1302 where it has been ruled that the general words "taking any other steps in the proceedings" appearing in section 34 of the Act just follow the specific expression "filing a written statement" and, therefore, any step alleged to have been taken by the party seeking to enforce the arbitration agreement must be such as would display unequivocal intention to proceed with the suit and acquiese in the method of resolution of dispute adopted by the concerned party, namely, filing of the suit and thereby must indicate that it has abandoned its right under the arbitration agreement to get the dispute resolved by arbitration; any other step would not disentitle the party from seeking relief under section 34 of the Act. Thus, contesting application for interim injunction or for appointment of receiver or for interim relief by itself without anything more would not constitute such step as would disentitle the party to the relief under section 34 of the Act. However, in the preent appeal, the question is whether thee arbitration clause quoted above would cover the disputes raised in the suit.

8. Rest of the respondents (other defendants) have

not appeared to resist the present appeal from order. In fact, their conduct will be displayed from the following order which was required to be made by this Court (Coram:R.Balia,J.) on 3rd April, 1998:

["The matter has come up for hearing today upon order dated 6.3.98. It appears that in pursuance thereof respondent No. 2 has again been informed and he has adopted the same practice of informing the court of his inability to appear and for postponing the hearing. The notices have been served of this date also before the date of hearing. It may be noticed that an application appears to have been filed on 18.3.1998 affixing with the court fee stamp of this country which goes to show that somebody is keeping watch on the proceedings but is refraining from appearing by himself or through counsel and to seek perennial postponement of hearing of this old matter by sending postal request for adjournment. Once it has come to the notice of respondent No. 2 way back on 27.2.1998 the fact that respondent NO. 2 has not made any arrangement even after expiry of one and half month to authorize anyone to appear on behalf of him before this Court and to make appropriate submissions but he is trying to seek postponement by fax messages and applications placed on record through unknown persons. Prayer does not appear to be bonafide. No more notice is, therefore, required to be given on the next date of hearing. The matter is on the continuous hearing board and shall be taken up for hearing as and when it is called out on its turn. "]

9. [Under the aforesaid circumstances, this appeal was taken up for hearing. I have heard the learned advocate appearing for the appellants and the learned advocate appearing for respondent No. 5 as aforesaid.]

10. In my opinion, the learned trial Judge has committed an error of law in not considering the substance of the suit while dealing with the arbitration clause in question. It might be noted that the arbitration clause is not as wide as would include within its sweep challenge to the contract itself including the arbitriation clause. It deals with the disputes arising under the fixure note containing the contract in question. It does not deal with the disputes which would arise as a result of either fraud or misrepresentation on the part of either of the parties to the contract. Thus,

vital part of the matter clearly appears to have escaped the attention of the learned trial Judge. It is a settled proposition of law that if the point in dispute is whether the contract in question containing the arbitration clause was ever entered into at all or was void ab initio, illegal, or obtained (for example) by fraud, duress or undue influence, the clause does not apply and the stay will be refused. This proposition of law as appearing in Halsbury's Laws of England, 3rd Edition, Vol. 2, page 24, para 56 has been quoted with approval by the Hon'ble Supreme Court in the case of Khardah Company Ltd. v. Raymon & Co. (India) Private Ltd. reported in AIR 1962 SC 1810 (See paragraph 11).

11. [In my opinion, the learned trial Judge has clearly committed an error of law in not visualizing the nature and substance of the suit as stated above while dealing with the application for stay of the suit under section 34 of the Act.] It might be noted that simply because the contesting defendants raised the dispute with regard to the plaintiffs having committed breach of not paying the balance amount of freight, it cannot be said that the nature of the suit or the substance of the suit would get altered or changed. The dispute sought to be raised by the contesting defendants might be under the contract represented by the fixure note in question. However, when the plaintiffs contended about the sea-worthiness of the vessel in question, resulting in vessel having not undertaken its journey at all on account of its unseaworthiness, the claim of return of amount of freight paid by the plaintiffs as well as the claim of damages would obviously be the result of suppression of the facts with regard to the unseaworthiness of the vessel in question. That being the nature and substance of the suit, the disputes arising in that respect would hardly have been referred to the arbitration as per clause of fixure note reproduced hereinabove.

12. The result is that this appeal deserves to be allowed. The order impugned in this appeal from order is hereby set aside. Special Civil Suit No. 64 of 1982 pending before the trial Court shall proceed further in accordance with law. [It will be open to defendant No. 5 to pray before the trial Court for decision of defendant No. 5's application Exh. 46 for deleting defendant No. 5 from the suit and the trial court after giving opportunity to defendant No. 5 and the plaintiffs of being heard, shall decide the same in accordance with law. It is also directed that the hearing of that application as well as the suit shall be expeditiously

undertaken by the trial Court and it shall give priority to the proceedings of the suit bearing in mind the fact that the suit is of 1982. This appeal is accordingly allowed with no order as to costs. The office will send back all the papers concerning the suit if lying with the office alongwith the writ of this order immediately to the trial Court.]

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Vyas